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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

## No. 134

ARROW DISTILLERIES, INC, an Illinois Corporation,
*Petitioner,*

*vs.*

ARROW DISTILLERIES, INC., a Michigan Corporation,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### STATEMENT OF REASONS WHY PETITION SHOULD BE DENIED.

We submit as reasons why the petition should be denied:

1. The questions raised by the petition turn on an interpretation of facts, all of which were adjudicated adversely to petitioner by the Master who heard all the witnesses and by the Court of Appeals, which determined from an independent review of the evidence that the findings of the Master "were not only supported by

substantial evidence, but a reading of the evidence convinces us that they were supported by a preponderance thereof."

2. There is no conflict or shadow of conflict between the rulings of this Court, the rulings of the respective Circuit Courts, and the judgment below on the questions involved in said petition.

3. The petition is utterly inconsistent, stating on the one hand that the Master's findings does "not depend upon the weighing of conflicting testimony or credibility of witnesses", on the other hand, that the findings of the District Court (overruling the Master) and the findings of the Court of Appeals (which sustained the Master) are "diametrically conflicting." The Master, the District Court and the Court of Appeals all found conflicting evidence, and that credibility of witnesses was involved.

## HISTORY OF THE WRONGFUL APPROPRIATION BY PETITIONER OF RESPONDENT'S CORPORATE NAME, TRADE NAME AND OTHER ACTS OF UNFAIR COMPETITION.

In the summer of 1933 it became apparent that the Twenty-first Amendment to the United States Constitution to repeal the Eighteenth Amendment would become affective by the end of that year (December 5, 1933), and that it would be legally possible, upon compliance with the necessary regulations, to engage in the business of manufacturing and selling alcoholic beverages. Plaintiff-respondent, in anticipation of this event, was incorporated in the State of Michigan on September 15, 1933, under the corporate name of "Arrow Distilleries, Inc." The new corporation took over the well established busi-

ness of the old International Extract & Research Laboratories, with which plaintiff's President had been connected, and actively prepared for its business of making and selling alcoholic cordials after repeal, while continuing to sell under its new corporate name of Arrow Distilleries, Inc., the non-alcoholic products of its predecessor.

Prior to the organization of defendant, plaintiff under its corporate name "Arrow Distilleries, Inc.," actually sold and shipped in interstate commerce 101 separate shipments of non-alcoholic cordials and flavoring extracts in cartons bearing its name as shipper (R. 130). These were billed by plaintiff, Arrow Distilleries, Inc., in its corporate name (R. 104). The record shows that as early as August, 1933, plaintiff had ordered supplies for its alcoholic products, such as glass bottles and the like, and had purchased a sizable building in Detroit (R. 66, 107).

Other contracts for bottles, labels, corks, advertising materials, booklets, leaflets, catalogs and order blanks were ordered by plaintiff in October and November, 1933 (R. 61, 67). These have plaintiff's name "Arrow Distilleries, Inc." and plaintiff's trade name "Arrow".

Advertising material prominently displaying plaintiff's trade name "Arrow" and plaintiff's corporate name "Arrow Distilleries, Inc." was placed in the hands of a large number of plaintiff's representatives throughout most of the country, and facsimiles of plaintiff's bottles, also displaying the trade name "Arrow" and plaintiff's corporate name, were used in order that plaintiff's representatives might familiarize the trade with the appearance of plaintiff's product, and from which orders for goods could be received (R. 67, 104, 133).

By the middle of November, 1933, plaintiff's plant was equipped to manufacture and bottle alcoholic liqueurs, and proceeded to receive orders to be delivered after plaintiff had received the necessary federal and state permits (R. 68, 107).

Many such orders for plaintiff's Arrow cordials and deposits in connection therewith were received by plaintiff as early as October and November, 1933 (R. 68), including orders for several hundred cases of alcoholic cordials and liqueurs from Illinois, New York, Maryland, Delaware, Wisconsin and other states (R. 70-1).

Much advertising, bearing the corporate name and trade name Arrow for the new products was done.

One of such advertisements was placed in October, 1933, for publication in the November issue of Midas Criterion, a national publication (R. 67, Pl. Ex. 66). The record shows that over a thousand prospective accounts, being largely old customers of plaintiff or its predecessor, were communicated with in November, 1933, and many of the orders received as a result of this campaign are listed at page 70 *et seq.* of the record.

On November 18, 1933, over two months after plaintiff was incorporated, defendant was incorporated as an Illinois corporation, under the identical name used by plaintiff, to-wit, Arrow Distilleries, Inc. (R. 82), and leased premises on Washington Street, Peoria, in November, 1933 (R. 163). Defendant claimed before the Master and the Court of Appeals that it succeeded to an alleged partnership business between Frankel and Silverstein, President and Secretary, respectively, of the defendant corporation. However, no business was done under the partnership until November, 1933. Silverstein, defendant's president, testified:

"After Frankel and I organized our partnership we had many meetings. We obtained lists of former Ben Weinstein Malt Company jobbers. We arranged meetings about financing. We interviewed Ben Weinstein and talked over various labels, and organization work, *and then in November* started taking orders and deposits, hiring salesmen, *and getting into active business*" (R. 237).

Plaintiff immediately protested in November, 1933, by long distance telephone to the adoption of this name by defendant. Shortly thereafter plaintiff received a letter (Pl. Ex. 47) on the letterhead of Arrow Distilleries, *Co.*, as follows:

"Warehouse — Office
401 South Washington Street — 506 Lehmann Bldg.
Arrow Distilleries Co.
Peoria, Illinois
Telephone 7592

November 25th, 1933

Mr. Abe Weinstein
3539 Concord Avenue
Detroit, Michigan

Dear Abe:

I was very much surprised when you called me on the phone this morning to learn that you had also incorporated the 'Arrow Distilleries' in the State of Michigan.

The reason we happened to pick this name was that Louis Schwabacher, a grandson of the original founder of the Arrow Brand is connected with our Organization and also Dave Friedman who was the last one to have possession of the Arrow firm.

We have already had some of our labels printed and have taken orders under the name of 'Arrow Distilleries, Inc.'

I am terribly sorry that this mix-up has happened and that we have both chosen the same name and want you to know that anything I can do to influence my associates to change this name and cooperate in every manner, I will be glad to do. However, when

I made this suggestion to them this morning, they seemed bitterly opposed to changing the name on account of the right they feel they have to it.

I would like to see the copy of the labels you are using so that we will not conflict on labels. It is our intention to start out with just blended whiskies and gins and not put out a line of cordials.

I will appreciate hearing from you by return mail and your advising me as to what your thoughts are on the matter.

Assuring you that I want to cooperate in every way, believe me to be,

Sincerely yours,

ROBERT SILVERSTEIN" (R. 57).

Upon receipt of the letter plaintiff's President went to Peoria to protest in person. The testimony is in conflict as to this conference. Plaintiff's President testified that defendant agreed that it would make a change in its name as soon as it possibly could do. Defendant also stated, as is stated in the letter of November 25, 1933, that they would not compete with plaintiff but would restrict their business to whiskey and gin and "had no intention of entering into the liqueur field" (R. 58). However, defendant did start in the liqueur and cordial business in competition with plaintiff in the fall of 1934, about one year after it started doing business. Plaintiff sent another protest to defendant by registered mail on November 23, 1935, again protesting against the use of plaintiff's names. This letter was returned to plaintiff marked "Refused. Unclaimed" (R. 58).

It appears from the record that Hiram Walker Distilleries and Distilleries and Brewers Corporation had sold a small amount of whiskey to defendant which defendant sold in December, 1933, without rebottling or re-labelling the products, but upon a part of which it claims to have

added a sticker "Distributed by Arrow Distilleries, Inc." (R. 87).

As late as May, 1934, defendant corporation was not manufacturing a drop of liqueur or cordials. They were making only gin and they were bottling only whiskey (R. 114).

A former employe of defendant, Walter Grundy, testified that in May, 1934, defendant was not manufacturing any cordials and was bottling straight whiskies and manufacturing and bottling blended whiskies and gin. He also testified that prior to the summer of 1935 defendant bottled no whiskies or gin under the name "Arrow" (R. 138).

The record shows that plaintiff upon receiving its federal and state permits continuously shipped in large quantities in interstate commerce, pursuant to orders previously received, cordials and liqueurs, beginning on February 20, 1934 (R. 59, 106).

The United States Government requires the keeping of Government Form Book 52, which shows all receipts of and shipments of all alcoholic products, one copy being retained and two copies going to the Division Office of the Bureau of Internal Revenue. Plaintiff produced its copies, and there can be no controversy as to the extent and widespread distribution of plaintiff in practically every state, which permits the sale of alcoholic beverages. See (Pl. Exs. 56-A and B, R. 118). Defendant did not produce its copies although requested to do so.

Defendant put out a circular, Plaintiff's Exhibit 104, featuring the brand name "Trianon" and containing the statement:

> "We are indeed proud to have Mr. Ignazio Caruso at the head of our cordial plant, which incidentally was outfitted under his personal supervision."

The record shows that Caruso started to work for the defendant in October, 1934, at which time he furnished defendant with his picture and the affidavits which are reproduced in Plaintiff's Exhibit 104 (R. 99). The circular (Pl. Ex. 104) further states:

> "Arrow Distilleries, Inc. of Peoria has led its field, first in whiskies, then in cordials and after repeal in whiskies once more.
>
> "Arrow didn't go back into the cordial business until we could find a capable head for our cordial department."

The reference to earlier whiskies and cordials was admittedly merely an advertising puff, inasmuch as defendant had no connection with any earlier company (R. 300). Incidentally, this folder contains pictures of several dozen products of defendant but none with "Arrow" labels. It does contain a reference to the effect that "Arrow" straight whiskies may be had under private brands.

On cross-examination defendant's President Silverstein testified:

> "We started labeling whiskey under the brand name of Arrow in December, 1935" (R. 251).

After defendant learned of plaintiff's corporate names, defendant purchased some whiskey and gin and a small line of cordials which it resold in the original bottles. It claims to have appended to the bottles or to some of them an additional sticker having the words "Distributed by Arrow Distilleries, Inc., Peoria, Ill." The testimony is conflicting as to the amount of such sales, and the practice of relabelling. Many witnesses, including defendant's employes and salesmen, testified that the goods they saw being handled or the goods they received from defendant had no such additional labels.

Nat Goodwin, defendant's former distributor in St. Louis, from December, 1933, to March, 1934, testified that he sold D & B merchandise for defendant until defendant brought out its own whiskey and gin about March 1, 1934. He examined much of the merchandise on the shelves which he sold. None of this merchandise received from defendant prior to March 1, 1934, had anything on the bottles to indicate that the defendant had anything to do with the bottling of the goods or the contents. He testified, "The first merchandise I ever saw or received from the defendant with the name Arrow Distilleries on it was just after March 1, 1934" (R. 158).

On cross-examination by defendant's counsel, Mr. Goodwin said:

> "The bottle of D & B goods did not have a little paster on it; they did not have a little paster reading 'from the Arrow Distilleries of Peoria.' I didn't see every bottle, but those I observed had no label of that kind on it at all. I sold nothing for the defendant but D & B liquor" (R. 159).

Sam Frienberg, operator of a drug store having a liquor department at St. Louis, was working as clerk and buyer at the Cleveland Drug Company in St. Louis in December, 1933. Shortly after repeal he bought defendant's liquor from Nat Goodwin, their St. Louis salesman. The bottles contained Hiram Walker labels and Distillers & Brewers labels. He testified:

> "There was no sticker on the bottle with the name 'Arrow Distilleries' on it. None of the bottles I received in that shipment had any stickers or labels on them bearing the name Arrow Distilleries" (R. 515).

Addie Rowell, one of the two employees of defendant in the latter part of November, 1933, testified that no

stickers were put on the bottles in the early days of defendant's business. She said:

> "If the defendant had received any quantity of labels between November, 1933, and January 1, 1934, I would have known about it. If a shipment of small stickers to be used on bottles had come in there during that time in any amount I would have known it. The supply room was an old safe. The supplies were kept on shelves in that safe. The defendant first started to put labels on bottles when they first started to manufacture liquor. That was quite late in February, 1934. I never saw anyone putting any small strips on bottles which read 'bottled by Arrow Distilleries, Peoria, Illinois' or 'Distributed by Arrow Distillers, Peoria, Illinois' or any similar wording prior to the time they started bottling. If anything of that kind had been done to any extent I would have seen it because my duties took me throughout the plant" (R. 506-7).

Frankel, defendant's secretary, testified to the contrary but admitted that defendant merely added another sticker to the labels already on the whiskey purchased from others (R. 87), and that labels were not put on all of the bottles (R. 97, 98).

On cross-examination the witness Rowell further testified:

> "Up until they started bottling their own whiskey in February, 1934, all shipments went out in the original packages without being opened or making any change that I ever saw and I was in and out of the shipping room very frequently every day" (R. 509).

Defendant's president admitted that some bottles were early put out by defendant which had no stickers or labels of defendant whatever (R. 247).

*The record contains many instances of confusion as found by the Master and the Court of Appeals.* Mrs.

Catherine Wilder, of Milwaukee, Wisconsin, familiar with plaintiff's products as sold under its name "Arrow" bought defendant's products under the name "Arrow", thinking they were the products of plaintiff, because she was familiar with plaintiff's name, Arrow Distilleries, Inc., and plaintiff's trade name "Arrow" (R. 148).

Albert Halperin, in the restaurant and liquor business in Chicago, bought defendant's product thinking that they were the products of plaintiff (R. 141).

Emil Nathan, associated with his father's partnership known as Emil Nathan Distillers Representative, at University City, Missouri, related many instances of confusion where customers thought they were buying plaintiff's products but got defendant's products and were disappointed with them (R. 143, 144, 145).

Joseph Kremarik operates a tavern in Milwaukee and was a customer of plaintiff. He purchased some of defendant's product depending upon the trade name "Arrow" and thinking it was plaintiff's product. However, when the goods were delivered he discovered the mistake and refused to accept it (R. 149).

Mayer Brown in the liquor business in Chicago, a customer of plaintiff, bought defendant's product relying upon the name and trade name, and was deceived and confused as to the products, and had complaints concerning defendant's products which he had bought because of confusion (R. 149, 150).

Many other instances of confusion on the part of customers are shown in the record. In addition trade reports were constantly confusing the two companies, to the detriment of plaintiff. Checks were sent to the defendant which belonged to plaintiff, the United States Treasury Department was confused between plaintiff and defend-

ant with reference to a package which was admitted in evidence (R. 73). Plaintiff was charged by the Alcoholic Beverage Commission of the State of Indiana in the early part of 1935 with certain violations of Indiana laws and regulations. The record shows that the Indiana officials confused plaintiff with defendant and later officially admitted the error (R. 74).

## THE PROCEEDINGS BEFORE THE MASTER.

The entire testimony was taken before the Master who heard 48 witnesses, whose testimony aggregates 2,475 pages. In recommending a decree for the plaintiff, the Master made specific findings, including the following:

> (a) Prior to September 15, 1933, there was no existing corporation by the name of Arrow Distilleries, Inc., and no property rights in said name;
>
> (b) Plaintiff, Arrow Distilleries, Inc., was incorporated September 15, 1933, in Michigan, and that defendant was incorporated under the same name on November 18, 1933, in Illinois;
>
> (c) Plaintiff immediately upon its incorporation began to operate in both state and interstate business, and during October, 1933, it actively prepared for doing business in cordials and liqueurs which could be made and sold legally after December 5, 1933, including the purchase of building, advertising, ordering bottles, labels, corks, cartons, catalogs, order blanks and materials in the name of Arrow Distilleries, Inc., or some part thereof, and has continuously since that time used its corporate name, or some part thereof, to mark all the goods bought or sold by it in both state and interstate business;
>
> (d) "That the plaintiff began to do business under its corporate name immediately upon its incorporation, inserting advertisements for and hiring salesmen, had salesmen out soliciting for business, and did many other acts showing an immediate and

continuous doing of business under its corporate name and before the defendant was incorporated or did any business."

(e) "That about November 25, 1933, the plaintiff discovered that the defendant had been incorporated in Illinois under the name of Arrow Distilleries, Inc., and fearing the effect on the public of the two corporations doing business of the same nature under the same name, the plaintiff called the defendant on the phone and endeavored to have the defendant change its name for the purpose of avoiding misunderstanding and confusion in the public mind; that after a trip to Peoria by representatives of the plaintiff, and several conversations with representatives of the defendant company, the defendant refused to negotiate further and returned the plaintiff's letters unopened, and continued wrongfully to use the corporate name 'Arrow Distilleries, Inc.' in its interstate business to the damage and detriment of the plaintiff."

(f) "That many instances of confusion were caused by the corporate names of the plaintiff and defendant being the same and by the similarity of labels and printing, and that the continued use of the name 'Arrow Distilleries, Inc.' and the word 'Arrow' as a brand name by the defendant was calculated to confuse and deceive and did confuse and deceive customers and prospective purchasers of the plaintiff's products to the loss and damage of the plaintiff."

(g) "That the defendant, Arrow Distilleries, Inc., of Peoria, Illinois, has been guilty of unfair competition with the plaintiff, as charged in the plaintiff's complaint, in that it has pursued a consistent course that has resulted in much confusion in the minds of the public and has injured the business of the plaintiff, and that such unfair competition consists:

a. In selling liqueurs and cordials under the brand name of the Plaintiff, 'Arrow', and with labels prominently displaying the name of the manufacturer in connection therewith, the corporate name 'Arrow Distilleries, Inc.';

b. In putting on the market alcohol, whiskey and gin under labels prominently displaying as the name of the manufacturer, 'Arrow Distilleries, Inc.' and in so placing those products on the market, in such a way as to make it possible for dealers to pass off on the buying public the defendant's products as products manufactured by the plaintiff, to the detriment of the plaintiff's reputation.

c. In causing confusion as to the identity of the plaintiff by the adoption and the continued use of the same corporate name as the plaintiff after being notified and requested to cease using plaintiff's name.

d. By a course of conduct making it possible for distributors, jobbers, and dealers to pass off defendant's products as those of the plaintiff and by so doing appropriate sale and profits which rightfully belonged to the plaintiff; and

e. By so imitating the label of plaintiff's Tom and Jerry that the public has been deceived into purchasing defendant's product believing that it was obtaining the product of the plaintiff."

The opinion of the Court of Appeals specifically refers to the taking of all of the testimony before the Master and the fact that the trial court heard no testimony, and after reviewing the facts and the findings of the Master, said:

"We think they were not clearly erroneous in this case. They were not only supported by substantial evidence, but a reading of the evidence convinces us that they were supported by a preponderance thereof" (R. 595).

In view of the conflicting evidence this Court may take judicial notice of defendant's record of misbranding of bottles and falsifying of records as fraud, condemned and adjudicated against defendant in *Arrow Distilleries, Inc. (def.)* v. *Alexander*, 109 F. (2d) 397, C. C. A. 7, in which defendant's license was suspended. Certiorari was denied. 210 U. S. 646.

## ARGUMENT.

All of the points now sought to be re-argued in the Supreme Court were presented to and decided adversely to petitioner by the Circuit Court of Appeals, either in its opinion rendered February 11, 1941 (117 F. (2d) 636) (R. 592-5) or in its denial of the petition for rehearing decided March 14, 1941 (R. 613).

The main case relied upon by petitioner is *Denver* v. *Denver Union Water Co.*, 246 U. S. 178. In that case the Supreme Court did what the Court of Appeals did in the instant case, to-wit, reviewed the testimony and completely sustained the findings of the Master. There is nothing in the Denver case, either in the decision of the Court or dictum which conflicts with the instant decision of the Court of Appeals. If counsel had analyzed that case they would have hardly placed their main reliance in their repeated citation and argument concerning it.

In the Denver case the Denver Water Company brought suit against the City of Denver to restrain the enforcement of an ordinance fixing the rates for water, upon the ground that such rates did not afford a fair and reasonable compensation based upon the value of the property of plaintiff, and hence amounted to the taking of private property without due process of law. The Master to whom the case was referred to take testimony and report the same to the court, in his findings found a proper valuation of the property, and that the effects were confiscatory. On review the District Court held that it was without power to consider the question of law raised or to examine the facts and affirmed the Master's report.

The Supreme Court while affirming the Master's report

held that on matters of law the trial court should have examined such questions. The Supreme Court proceeded to do so, and specifically approved the findings of the Master. A quick understanding of the case may be derived from the last four lines of the opinion of the Supreme Court to the effect that the decree of the District Court, which had sustained the Master's findings "will be modified so as to overrule, instead of striking out, the exceptions taken by defendants to the Master's report, and as so modified it will be affirmed."

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Petitioner seems to argue that no weight attached to the Master's findings because of a reservation in the reference to the Master that the findings or conclusions of law of the Master should not be final, and that the findings of the Court of Appeals are entitled to no weight. Such a contention is unsound for three reasons:

(1) All of the testimony was taken and all of the witnesses appeared before the Master. The evidence was highly conflicting as found by the Master, the Trial Court and the Court of Appeals, and the Master was the only judicial body who had an opportunity to observe the witnesses and completely judge credibility. The logic behind Rule 53(e)(2) of the Rules of Civil Procedure providing that "in an action to be tried without a jury the Court shall accept the Master's findings of fact unless clearly erroneous" is applicable. This is so especially in view of Rule 52 which, while referring to the Court, emphasizes the proposition that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opinion of the trial court to judge of the credibility of the witnesses."

(2) The reservation in the order of reference was plainly intended and could only have the effect of averting the operation of that portion of old Equity Rule 61½

which provided that a consent reference might bind the parties to accept the findings of the Master as final to the same extent as an arbitrator's award. It could not affect, nor does it intend or appear to have been intended in any way to modify the normal operation of the old Equity Rule or the provisions of Federal Rules for Civil Procedure 53(e)(2). The reservation had no effect in view of the further provision of Federal Rules for Civil Procedure 53(e)(2) which provides that the Court after hearing may adopt, modify or reject the report. In view of the fact that all of the testimony was taken before the Master, and all of the witnesses appeared before him, and no witness appeared before the trial court, the Master was in a better position than anybody else to judge credibility and weigh conflicting evidence.

In *Adamson* v. *Gilliland*, 242 U. S. 350, this Court said (p. 353):

> "* * * The case is preeminently one for the application of the practical rule that so far as the findings of the master or judge, who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

(3) The Court of Appeals specifically found that the findings of the Master were not "clearly erroneous", but held that "they are not only supported by substantial evidence but a reading of the evidence convinces us that they were supported by a preponderance thereof" (R. 595).

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Petitioner in its specification of errors (p. 8) complains that the Master "failed to make such findings that petitioner had established its right to the use of the trade

name 'Arrow' as a technical trade mark." Apparently counsel are confused as to the issues in this case. No technical trade mark was asserted in the pleadings or introduced in evidence or claimed by either of the parties. In fact petitioner specifically admitted that it had never applied for trade mark registration (R. 271, 408).

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The argument that the Master did not make complete findings was presented to the Court of Appeals which found adversely to petitioner. One example should suffice.

Petitioner asserted its trumped-up charge that a so-called partnership had made an earlier use of the corporate name. The Master held specifically that there was no proprietary interest in the name prior to the time plaintiff-respondent was organized. The Master heard the conflicting testimony of petitioner's own witnesses, and with the admission of respondent's president, Silverstein, that the partnership did not start taking orders and deposits and getting into active business until November, 1933 (R. 237), was fully justified in holding that plaintiff was the first appropriator of the corporate name as well as of the trade name.

Petitioner says there is no conflicting evidence. The above example and many others referred to in the opinion of the Court of Appeals shows that the testimony of petitioner's own witnesses was so highly conflicting that little credence could be given it.

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Perhaps nowhere is better illustrated the proposition that the trier of the facts, who saw and heard the witnesses, was better able to make findings than in the con-

tention made on pages 18 and 19 of the petition that the findings of the trial court who saw no witnesses should prevail. Petitioner relies upon a finding of the trial court that since December 5, 1933, respondent labeled all of its bottles with its name, and some of them with the name "Arrow". Had the trial court been able to see the witnesses, it would have been compelled to consider the admissions of defendant's officers to the effect that defendant was not manufacturing liqueurs and cordials in June, 1934 (R. 291). In fact, defendant's president was compelled to admit that not all of the bottles, purchased from others, were re-labeled, and that much of it went out in the original cartons and were not identified by defendant, and that even as to cartons which defendant did open, some of the bottles were not re-labeled or marked in any manner by defendant (R. 195-6). Defendant's secretary, Frankel, admitted that labels were not put on all of the bottles of defendant, and that some bottles that came in from distillers and brewers were not changed as to labels or otherwise at all (R. 97). In addition the record shows from the testimony of former employes and agents of defendant that it did not re-label its early shipments or attach stickers "distributed by Arrow Distilleries, Inc.", or attach any other means of identification (R. 158-9, 515, 506-7). On these conflicting contentions and conflicting evidence the Master and the Court of Appeals found and awarded priority of use to plaintiff.

The record in this case clearly demonstrates that there is no conflict between the decisions of this Court and the Seventh Circuit, or any other circuit; that no important question of federal law is involved which has not heretofore been settled and decided by this Court; that there is no special or important reason for a review of

this case by this Court, or any other reason for this Court to entertain jurisdiction of this cause.

We therefore respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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